IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE
WRIT PETITION NO. 9483 OF 2004

Lalsaheb Maniksaheb Shaikh
and others ... Petitioners

Vs.

Dadasaheb Maniksaheb Shaikh
and another ... Respondents

Mr. P.K. Dhakephalkar i/by Mr. A.P. Mhatre for Petitioner.

Mr. A.A. Valsangkar with Mr. Pankaj J. Das for Respondent.

CORAM : F.I. REBELLO,J.
DATED : JANUARY 25, 2005

P.C.

1. The Petitioner by the present petition, challenges the order dated 4.11.2004. By that order, the appeal preferred by the Respondent/original Plaintiff has been allowed. A few facts may be set out :

2. The Respondent herein have filed a suit being Special Suit No. 66 of 2004. The case of the Respondent is that the Respondent No. 1 was the owner of the property identified under Gat No. 1257 and that property has been sold to Petitioner No. 2. In the said property Respondent who is his brother has illegally put up a construction. Similarly Respondent No. 1 permitted Respondent No. 2 to use part of the premises for putting up

structure and similarly Respondent No. 1 permitted Respondent No. 3 to put up another structure. The entire property admeasures 28 H 66 R. The encroachment by the defendants has been described in Paragraph 1 of the plaint. The reliefs prayed are for removal of the structures as put up and described in Paragraph 1A, 1B, as also some other reliefs. There is also relief in terms of Prayer Clause (b) for injunction. An application for temporary injunction was taken out which was dismissed by order dated 7.6.2004. An appeal was preferred against that order. The appeal was allowed and the injunction as prayed for by Respondent was granted by order dated 4.11.2004. It is this order which is the subject matter of the present petition.

3. On behalf of the petitioner their learned counsel contends that initially respondent No. 1 herein as Plaintiff had filed suit against petitioner No. 1 amongst others. In that suit the prayers as prayed for was that the Petitioner herein had made encroachment in unauthorised manner in the open and vacant premises of Gat No. 1257 and for direction to remove the structures and to hand over open possession to the Plaintiff and for injunction. It is therefore, submitted that considering the prayer Clauses by Respondent No. 1 itself, it was clear that Respondent No. 1 was not

in possession. It is also submitted that the appellate court itself in Paragraph 13 of the judgement has recorded a finding that as on 28.8.2003 neither Plaintiff No. 1 nor 2 were in possession of the disputed suit premises. Once that be the case it is submitted that the relief of injunction sought for by Respondent Nos. 1 and 2 herein could not have been granted. It is further submitted that there is contemporaneous record in the form of sale deed wherein also there is recital that the possession is not with Petitioner No. 1 and as and when the suit is decided and possession recovered, petitioner No. 1 will hand over possession of the property to Petitioner No. 2. The finding therefore, it is submitted, by the appellate court that Respondent Nos. 1 and 2 are in possession is perverse and consequently, discloses error of law apparent on the face of record and consequently this court ought to interfere in the exercise of its extra ordinary jurisdiction and set aside the impugned order.

4. On the other hand on behalf of Respondent Nos. 1 and 2, their learned counsel submits that if the averment in the original suit No. 93 of 2000 are seen, it will have to be appreciated, that what the respondent No. 1 was contending was that in a part of the property there has been encroachment to the extent of the structures that have been put up. It

is submitted that it was not the case of the Respondent No. 1 that it is the petitioner No. 1 who was in possession and the pleadings have to be read in that context. That suit was withdrawn with liberty to file fresh suit. In the fresh suit as filed, the petitioners have clearly set out as to which are the encroached portions. It is further submitted that Respondent No. 1 sold the property to Respondent No. 2 by sale deed dated 30.10.2002. It is then pointed out that it was the case of Petitioner NO. 1 that defendant No. 2 in the suit had been allowed to put up construction by him. Defendant No. 2 Sikandar has surrendered possession of the area occupied by him to Respondent No. 1 herein. A possession receipt has been issued. It is then submitted that both the courts below have recorded a finding that it is the Respondent No. 1 who has title to the property, Gat No. 1297. The revenue entries, namely 7/12 records are in the name of the Respondent No. 1. There is therefore, presumption of possession in favour of the Respondent No. 1. It was therefore, for the petitioner to rebut the presumption by documentary evidence. The documentary evidence produced by the petitioner is merely in respect of the house tax receipts. It is the case of Respondent No. 1 that when house was constructed illegally and merely because receipts stand in the name of petitioner cannot result in rebutting the

presumption in favour of the Respondent No.1. The learned counsel submits that the suit is filed both by Respondent No. 1 and 2. Even if there be some dispute as to the possession of Respondent No. 2, none the less considering the sale deed and the averments therein Respondent NO. 1 was bound to hand over possession to Respondent No. 2. The Respondent No. 1 therefore had interest in filing the suit along with Respondent No. 2 and in these circumstances, submitted that considering two findings as to possession and further finding by the appellate court that irreparable loss and injury will be caused to the respondents, this court in exercise of its extra ordinary jurisdiction ought not to interfere with the order of the appellate court.

5. Having considered the said contentions, in the first instance before examining the necessity of considering averments in the first place i.e. Regular Civil Suit No. 93 of 2000 and the subsequent pleadings in Special Suit No. 66 of 2004 it will have to be examined as to whether Respondent No. 1 and 2 had made out a case of title to the property.From the order of the trial court in Special Suit No. 66 of 2004, there is clearly a finding while answering point No. 1 that the entire Gat No. 1257 was allotted to Respondent No. 1. Similarly there is finding on perusal of

7/12 extract of Gat No. 1256 that the name of Respondent No. 1 is recorded as owner in possessory column. Considering the contention of the Petitioner herein the finding recorded based on the house tax document is that defendant No. 1 is having some concern with the suit property. In other words, the finding in favour of Respondent No. 1 at the prima facie stage is that he is the owner and that Petitioner No. 1 had some concern with the property. The appellate court in its order has also considered the title of Respondent No. 1 and Petitioner No.1. Perusal of the judgment would show that the court noted that Family members of Petitioner No. 1 and Respondent No. 1 had approached arbitrator Dr. Sathe for settlement. The award passed was made rule of the court and thereafter certificate was issued in Application No. 4 of 1981. In Para 48 after referring to various documents, the learned appellate court has held that Gat No. 1257 came to the share of Respondent No. 1. It is therefore, clear that Respondent No. 1 has made out strong prima facie case that he has title to the property. The property has been sold by Respondent No. 1 to Respondent No. 2.

6. The next issue would be as to whether Respondent No. 1 and 2 has made out a case that

they were in possession of the property. Firstly 7/12 extracts are in favour of the Respondent No. 1. That at the prima facie stage, courts raises a presumption in favour of the Respondent No. 1 herein. This is in terms of law so declared by the Apex Court. This prima facie possession has to be rebutted at the stage of interim relief by strong documentary evidence. We may therefore, examine as to whether the findings of the appellate court can be said to be perverse and as such discloses an error of law apparent on the face of record.

. The first submission is based on the pleadings. After going through the pleadings in Regular Civil Suit No. 193 of 2000 it would be clear that there is no admission by Respondent No. 1 therein that he was dispossessed of the entire 28 hectors. At the highest from the pleadings what can be seen is that there were some encroachment in parts of the property. In the pleadings he had averred that for one year, he had given the property to one Sandipan, resident of Mohol for cultivation on sharing basis. In Paragraph 4 the cause of action which was set out was that encroachment has been made on the said property by shed of Touring Cinema Theatre and Garage. It is therefore, clear that if the averments are read in their totality, there is nothing to show that Respondent No. 1 had pleaded that he was dispossessed from the entire suit

property. The argument therefore, advanced on behalf of the petitioner from the averments in the first suit to indicate that Respondent No. 1 was not in possession has to be rejected.

. We then come to the other limb of the argument namely finding by the appellate court that Respondent NO. 1 was not in possession. Perusal of the findings in Para 61 no doubt may indicate that Respondent NO. 1 and 2 were not in possession as on 29.8.2003. To my mind this finding is contrary to record, considering 7/12 extract record in favour of respondent No. 1 which was not rebutted by any documentary evidence by the Petitioner No. 1. The appellate Court then proceeded on the footing that pursuant to the entries by the Tahsildar on 29.8.2003 Respondent No. 1 and 2 are in possession. Clearly Respondent Nos. 1 and 2 would be in possession not because of the entries but because they were already in possession. The entries only reflect the possession as it stood. To my mind therefore, that contention also will have to be rejected.

. In so far as documentary evidence is concerned, the learned appellate court has been pleased to discuss the same and observed that they pertain to House Nos. and merely because the Panchayat passed a resolution would not be binding on Respondent

Nos. 1 and 2 herein as they were not parties. To my mind considering the documentary evidence, the findings by the appellate court, its ultimate conclusion has to be accepted which is that it is Respondent No. 1 who was in possession. Once that be the case, and as Respondent Nos. 1 and 2 have made out case that they were in possession, consequently their possession has to be protected. The issue of irreparable loss and injury has also been considered by the learned appellate Court, if one peruses Para 17 of the judgement. Respondent Nos. 1 and 2 have also been able to show their right in the property.

. In the light of that this will not be a fit case for interference by this court in its extra ordinary jurisdiction. Hence, petition rejected.

(F.I.REBELLO,J.)